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Zygmunt J.B. Plater

Boston College Law School, plater@bc.edu

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A JEFFERSONIAN CHALLENGE FROM TENNESSEE: THE NOTORIOUS CASE OF THE ENDANGERED "SNAIL DARTER" VERSUS TVA'S TELLICO DAM—AND WHERE WAS THE FOURTH ESTATE, THE PRESS?

ZYGMUNT J.B. PLATER*

I. INTRODUCTION

For most if not all public interest issues in contemporary governance debates, there are in effect four branches of government, not three. For better or worse, the modern media constitute the essential public information source playing a determinative role in the intensely political internal processes of modern government at every level. To ignore the fundamental reality of this Fourth Estate¹ is not to fully understand modern civics and is to risk repeated shortfalls for citizen initiatives attempting to advance public welfare. In no other field is this proposition more evident than in the realm of governmental protection of environmental resources and values.

This essay seeks to draw useful analysis and perceptions about the modern media's systemic impact upon national governance, using a highly charged, true-life parable from Tennessee, examined in the hindsight of over thirty years. A national environmental saga that arose from Tennessee more than three decades ago—when a group of citizens persuaded the U.S. Supreme Court to block completion of the Tennessee Valley Authority's final dam project because it endangered a tiny "snail darter" perch—intensely reflected the decisive role played by the acts and omissions of local and national media.

* Professor of Law, Boston College Law School. A.B. Princeton, 1965; J.D. Yale, 1968; S.J.D. Michigan, 1982. I was honored and delighted that the University of Tennessee College of Law and the Howard H. Baker, Jr. Center for Public Policy were able to present such an engaging and thought-provoking Symposium focused on the legal and media battles over the Little Tennessee River. My gratitude and admiration are extended to the students, faculty, and staff who created and implemented the symposium so well.

1. Edmund Burke may have coined the name of "Fourth Estate" for the press, acknowledging its potent role in government. In Europe the accepted participants in post-feudal realms were often classed in three estates—in France, the clergy, the nobility, and the haute bourgeoisie; in England the Lords Spiritual, Lords Temporal, and House of Commons. In 1787, noting the presence of reporters allowed to observe proceedings in Parliament, Burke is supposed to have said, "There are Three Estates in Parliament, but, in the Reporters' Gallery yonder there sits a Fourth Estate, more important far than they all" (as quoted in Thomas Carlyle's book, *HEROS AND HERO WORSHIP IN HISTORY* (1841)).

"Little fish bites dam"—that basic media caricature immediately and predictably grabbed wide, raucous, public attention when the diminutive snail darter halted TVA's Tellico Dam Project. But there was far more to the story, with serious public interests at risk waiting to be developed and reported as the case moved through the channels of government. The agency's dam project contained very dubious economic justifications, questionable condemnations of private farmlands for corporate resale, destruction of extraordinary natural and economic resources, and the availability of extraordinarily valuable development alternatives without a dam. Yet despite voluminous ink and air time lavished on the fish-versus-dam story (one of the decade's three most-covered environmental stories),² from beginning to end the media fundamentally failed to discern and report the dramatic realities behind the caricature, and that failure ultimately permitted a tragic miscarriage of the public interest.

Tracking the complex narrative of the Tellico Dam case and its parallel caricature in media and politics, this analysis explores the case as a paradigm and parable for assessing how and why the media performs its role impacting the law as it does.³

2. The darter versus dam story, according to Professor Ronald Rollet, an environmental journalism specialist at the University of Michigan School of Natural Resources, was one of the three most-covered environmental stories in the press of that decade—as recounted to the author by Dr. Rollet, the other two issues were the Love Canal toxics case and the Alaska Lands Act controversy.

3. The author and his students in Tennessee and Michigan, with help from many others noted here and in the book noted last below, served as petitioner and attorney in the case, carrying it from its start in old Fort Loudon on its bluff above the Little Tennessee River, up through federal agencies, three Congresses, the Supreme Court, the first-ever congressionally-mandated inquiry in the so-called "God Committee" or "God Squad," and extensive efforts with the press. This essay is thus written from the perspective of an avowed advocate, but as an academic, the author is also constrained by a responsibility of fairness to opposing arguments. It is impossible, of course, to remove one's personal reactions to a dramatic case through which one has lived. On the objective historical record, however, most of the facts of this particular case were ultimately determined to be extremely one-sided. In a wide range of areas, as the 1979 God Committee ultimately concluded, the actual merits of the Authority's case for the dam project were slim to none. Seen in retrospect, the citizens' arguments and alternative plans from the start were overwhelmingly more accurate and positive for the affirmative interests of the public and the environment.

The history of the snail darter case is reflected in several books, which interested readers are encouraged to explore. See WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELlico DAM, 1936-1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA* (Univ. of Tenn. Press, 1986) (hereinafter WHEELER & McDONALD); MICHAEL R. FITZGERALD & STEPHEN J. RECHICHAR, *THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENT REGULATION* (Univ. of Tenn. Press, 1983); see also WILLIAM U. CHANDLER, *THE MYTH OF TVA* (Ballinger, 1984) (examining differential economic development in the region); J. THOMPSON & C. BROOKS, *TELLICO DAM AND THE SNAIL DARTER* (Spectrum, 1991) (presenting the TVA arguments in a

II. JEFFERSON, MADISON, AND THE ELEMENTAL ROLE OF THE PRESS IN A DEMOCRACY

Thomas Jefferson framed the critical role that journalism must play in a democratic society, providing essential information to the American public so that citizens can hold their government to its high calling. Deeming “the good sense of the people...the only safeguard of the public liberty,” Jefferson counseled that “if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.”

And how was the public to be informed, in Jefferson’s ideal?

Give them full information of their affairs thro’ the channel of the public papers, and...contrive that those papers should penetrate the whole mass of the people Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.⁴

As Madison added, “A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”⁵

complimentary light); FRANCES BROWN DORWARD, *DAM GREED* (Xlibris, 2009) (presenting a local history of the Little Tennessee River valley and Tellico Dam based upon many oral history interviews); KENNETH M. MURCHISON, *THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT* (Univ. of Kansas Press, 2007) (including excellent and exhaustive accounting of twenty-five years of legal proceedings in the agencies, Congress, and courts, based on extensive reviews of published official legal records). Some of the author’s earlier thoughts on the subject of media can be found in *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. LAW 1 (2002); and *Law, Media, & Environmental Policy: A Fundamental Linkage in Sustainable Democratic Governance*, 33 B. C. ENVTL. AFF. L. REV. 511 (2006). And recently appearing from the author is *THE SNAIL DARTER AND THE DAM—HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* (Yale Univ. Press, 2013) (hereinafter *SNAIL DARTER & THE DAM*). Portions of this essay draw directly from that text. A substantial archive of further materials is also available at the book’s website, see *Digital Commons*, BOSTON COLLEGE LAW SCHOOL, www.bc.edu/snaildarter (last visited May 29, 2013).

4. Thomas Jefferson to Edward Carrington, 1787, quoted in JOHN NICHOLS & ROBERT MCCHESENEY, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 119 (Nation, 2011).

5. James Madison to W. T. Barry, 1822, quoted in RALPH LOUIS KETCHAM, *SELECTED WRITINGS OF JAMES MADISON* 308 (Hackett, 2006); Thomas Jefferson to William C. Jarvis, 1820, quoted in ROGER OSBORNE, *CIVILIZATION: A NEW HISTORY OF THE WESTERN WORLD* 324 (Pegasus, 2006).

As in the nation's early years, the press continues to provide the daily flow of facts and opinion that reaches the American public's eyes and ears. When a situation is well covered by the media, Congress knows it is on the radar of public opinion and tends to address it on the merits. If it is not, all too often what governs is business-as-usual, tribalistic, off-the-radar insider capitol politics.

Over past decades the active engagement, or absence, of thoughtful journalistic inquiry has repeatedly determined how well governmental decision-making and Establishment-pressured politics have served the public welfare. Watergate and the WMD-driven invasion of Iraq are polar opposites, where the press⁶ forced open a public window upon the core facts of a significant public controversy, or didn't.

The essential role of the press in informing the public is repeatedly relevant throughout modern national affairs—in the areas of civil rights, communication, securities and banking, industrial production, labor, foreign relations, transportation, health care, large and small business, large and small agriculture, mining and other resource exploitation, emergency preparedness, information technology, patterns of wealth and poverty, and much more.

A core reality in the public importance of the media is that within the internal dynamics of the political process the official players generally are well aware of the public-interest facts but—absent public awareness—make decisions based upon the very different calculus of capitol politics. Daily political life is dominated by the internal institutional dynamics of legislatures and a sea of lobbying pressures, alliances, campaign finance contributions and other seductive blandishments coming from the established special interest “iron triangles”⁷ of capitol politics. When a

6. In this essay the words “press” and “media” are used interchangeably, although it should be noted that “media” currently often connotes a broader range of communication. “Media” today includes the vast sea of political public relations information created and proliferated by market players to project their agendas and point of view into the political process. Further, in this essay, “media” is often but not always singular, despite the word's proper Latin plurality, in order to fit the ears of spoken English diction.

7. “Iron triangles,” in modern political science lexicon, are the working alliances that dominate many of the most important administrative and legislative processes in modern government—interlocking triads of specialized economic interests (like mining, timber, military equipment, highway construction, water projects, guns, and dozens more), and the legislators and administrative agencies with which they interlock. See FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* (HarperCollins 3d ed. 1984). Often working together, they constitute the world of political “insiders”—the political Establishment that shapes the daily reality of government actions at federal and state levels. Because they are typically mobilized to secure special individualized advantages from the existing pattern of laws and economics, they tend to be regressive, counterpoised against the public interest as a whole, often resembling the “extractive élites.” See D. ACEMOGLU & J. ROBINSON, *WHY NATIONS FAIL* (2012) (explaining that such parties ride their own narrowed special interests

vivid event like a disaster, or the first Earth Day, thrusts essential facts and problems of governance issues into public consciousness, however, the political process often is forced to debate and decide matters based upon the actual public merits rather than insider dynamics . . . as long as public attention continues to focus upon the issue.

In the environmental realm, such active media coverage has played a decisive role in virtually every area. When the press has reacted vividly and with tenacity to a public problem—including the Love Canal toxic contamination, the Kepone pesticide contamination, the Exxon-Valdez oil spill, the Reagan Administration's proposal to sell off certain national parks, the "Bridge to Nowhere," and the Bush Administration's proposal to allow trading in toxic mercury air pollution credits⁸—the iron triangles are weakened and protective law is applied. These cases are prime contemporary examples of the press's active Jeffersonian function of raising the public's civic awareness of facts that otherwise might have been masked by official opacity.

When the press is absent or impersistent on an issue, failing to understand or note significant irrationalities in iron triangle projects or programs, the insider game can roll on unhindered by any likelihood of corrective public pressure from informed voters.⁹ Examples include the failure to note the unstable mortgage derivative balloon created by unregulated financial manipulations of the securities markets prior to 2008, the uncritical acceptance of the existence of nuclear threat in Iraq, the wasteful and destructive construction of the Army Corps of Engineers'

in profit and power, controlling and manipulating the status quo to the long term detriment of their societies).

8. Covered heavily by the media, the Love Canal residential contamination and the Allied Chemical Kepone incident on the James River and Chesapeake Bay led to congressional strengthening of the toxic and water quality statutes. *See* ADELINE G. LEVINE, *LOVE CANAL: SCIENCE, POLITICS AND PEOPLE* (1982); PLATER ET AL., *ENVIRONMENTAL LAW & POLICY* 38-52 (4th ed. 2009); *Seven Years in Iraq: An Iraq Timeline*, TIME MAGAZINE, <http://www.time.com/time/specials/packages/0,28757,1967340,00.html> (last visited May 29, 2013); *Iraq War in Quotes*, ZFACTS, <http://zfacts.com/iraq-war-quotes> (last visited May 29, 2013); GEOFFREY SMITH, *THE TENNESSEE-TOMBIGBEE WATERWAY: A CRITICAL STUDY* (1991) (Thesis, 5-1991, TRACE: Tennessee Research and Creative Exchange). After the 1989 Exxon-Valdez spill, the public's media-driven awareness of the disaster led to actual legislative response, the Oil Pollution Act of 1990, which, though subsequently somewhat eroded, made several improvements in oil industry management. Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. §§ 2701-3207 (2006)).

9. The information that is presented by the news media tends to define the outward boundaries of what is subjected to conversation and debate within the electorate. In many environmental cases public awareness doesn't include a realization that further significant information may exist and be missing from the debate; active public demand for further facts that are not being reported is quite rare. *See* W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 216 (2001).

“Mister GO” shipping channel at New Orleans, the Corps’ \$4 billion Tennessee-Tombigbee scheme literally moving mountains to create a useless channel in Alabama to parallel the Mississippi, and dozens more.¹⁰ In these cases, the lassitude of the press illustrated, by omission, the importance of the media’s Jeffersonian role, and harmful public consequences followed media failures to report ongoing official mistakes.

As the 2009 Knight Commission noted, the press’s role is to sustain a national “informed community” where the public gains news and information “to participate in our system of self-government, [where the media sustains] the critical democratic values of openness, inclusion, participation, empowerment, and the common pursuit of truth and the public interest”—paradigmatic modern Jeffersonianism.¹¹

10. The Army Corps of Engineers’ “Mississippi River Gulf Outlet” (MRGO) shipping channel destroyed the protective barrier islands south of New Orleans, channeled the Katrina and Rita hurricane flood forces directly into the heart of the city, and has never been substantially used by ships. See R. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD* (2010). Disasters don’t always succeed in countering the inside players. After the BP Deepwater Horizon blowout, BP deployed a masterful political and media campaign to minimize public awareness of the agency-corporate actions that had led to the calamity, and of the true short and long term consequences of the oil and dispersants released into the coastal communities and environment. See THOMAS BERGIN, *SPILLS AND SPIN: THE INSIDE STORY OF BP* (2012).

BP in fact had borne a primary responsibility for causing the Exxon-Valdez spill. See Noaki Schwartz, *BP Had a Key Role in the Exxon Valdez Disaster*, ASSOC. PRESS (May 25, 2010), <http://www.utsandiego.com/news/2010/may/25/bp-had-a-key-role-in-the-exxon-valdez-disaster/>. At the time of the Exxon Valdez spill, BP had a 50.01% controlling interest within the seven-corporation Alyeska consortium, which meant that the Alyeska consortium’s operational decisions, much criticized by the Alaska Commission report, were driven by BP’s majority position. See also Plater, *The Exxon Valdez Re-Surfaces in the Gulf of Mexico*, 38 B. C. ENVTL. AFF. L. REV. 391, 398, n.28 (2011). BP learned and successfully applied major lessons in press and public opinion management from the Exxon-Valdez event, substantially undercutting public awareness of the serious lingering harms from the BP Deepwater Horizon blowout. See also Jeremy W. Peters, *Efforts to Limit the Flow of Spill News*, NEW YORK TIMES (Jun. 9, 2010), http://www.nytimes.com/2010/06/10/us/10access.html?pagewanted=all&_r=0; Lenon Honor, *Media Mind Control and the BP Oil Spill in the Gulf of Mexico*, LENON HONOR FILMS, <http://www.lenonhonorfilms.com/BPOilspillinthegulfofmexicoPart1.html> (last visited May 29, 2013).

11. The Knight Commission on the Information Needs of Communities in a Democracy, *Report: Informing Communities: Sustaining Democracy in the Digital Age*, at xi (2009), available at http://www.knightcomm.org/wp-content/uploads/2010/02/Informing_Communities_Sustaining_Democracy_in_the_Digital_Age.pdf.

III. THE TVA TELLICO PROJECT AND THE ENDANGERED “SNAIL DARTER”

The long-protracted battles over the Tennessee Valley Authority’s Tellico Project, the region’s last dam project—and especially the last six years of battles waged over the little endangered snail darter fish—reflected the Jeffersonian-Madisonian challenge in an extraordinary citizen effort that the eminent ecology scholar E.O. Wilson has called “the Thermopylae in the history of America’s conservation movement.” The Tellico Project opposition, in which the author and his students played a significant part in those final six years,¹² carried the case up through multiple state and federal agencies, multiple courts, multiple Congresses, and multiple White Houses. The facts of the case on the official record became clearer and clearer: the dam and reservoir part of the project made no sense.

The unfortunate twist in the Tellico Dam case is that for the majority of Americans who followed print or electronic media throughout the 1970s, the snail darter was depicted as little more than a lightweight joke. The Jeffersonian challenge was not met.

A. The TVA Tellico Project, 1959-1981—Basic Facts

Facing internal malaise¹³ after three decades developing a sprawling electric power system throughout the Tennessee River system, TVA Chairman Aubrey “Red” Wagner called a high-level staff meeting on Friday, February 13, 1959, to figure ways to justify “a new mission” for the agency to rebuild morale within the agency. TVA was producing 90% of its electricity with coal and nuclear energy; in effect it had become just a large public utility company. Because sixty-eight dams had already been built on the Tennessee River system, no suitable hydropower sites remained. But Wagner hoped TVA could find new ways to justify building more projects by imagining regional development justifications for a renewed sense of mission.

It may be possible to demonstrate that added projects would contribute enough to further regional development to amply justify their construction. It may only depend on how ingenious and resourceful we can be in finding a basis for evaluating a project’s usefulness Come . . . and bring all the optimism you have.¹⁴

Out of this meeting was birthed TVA’s Tellico Project proposal. Its major claimed economic development benefit justifications¹⁵ were indeed

12. See *supra* note 1 and accompanying text.

13. See WHEELER & McDONALD, *supra* note 3 (describing the history of the internal crisis in morale within TVA that triggered the Tellico Project).

14. *Id.* at 3–4.

15. Pursuant to Senate Document No. 97, 87th Cong., 2d Sess. (1964), every federal agency, when spending taxpayer dollars, had to show a theoretically profitable benefit-cost

ingenious. The last undammed thirty-three miles of the Little Tennessee River were too marginal a location to sustain the traditional dam project justifications of energy or flood control. As Chairman Wagner acknowledged to a reporter, a Tellico Dam's electric power potential and flood control would be relatively "insignificant."¹⁶ To justify a dam and reservoir, Wagner's economists were told to hypothesize expansive core benefits in *land development* and *recreation*.

For land development benefits, instead of condemning just the land needed for a dammed reservoir—roughly 12,000 acres—TVA would condemn (or buy under threat of eminent domain) almost 38,000 acres, sixty square miles, more than 300 family farms. The Boeing Corporation from Seattle would take most of this private land for resale or development, not for the reservoir.¹⁷ Asa and Nell McCall's farm of ninety acres was being taken though less than three acres would be flooded; the rest was taken for re-sale. (The average price paid per acre was \$330, exclusive of buildings; homes and barns averaged about \$6,000.)¹⁸ TVA and Boeing announced they were designing a "model city" development, to be named "Timberlake," for Lt. Henry Timberlake, the colonial officer who had negotiated with the Cherokee and drawn the first map of the region in 1762. Chairman Wagner said that within a few years the model city would have 50,000 residents and generate 25,000 jobs.

For recreational benefits, despite twenty-four flat-water reservoirs already existing within fifty miles, by eliminating the last-remaining high-quality big flowing river stretch in the Southeastern United States—which regularly attracted trout fishermen from four surrounding states—TVA economists projected that a flat-water Tellico lake would add \$1.4 million annually in net recreational benefits. These two constructed rationales

ratio—for every taxpayer dollar spent, a proposed project has to be able to claim to earn at least \$1.01 over 100 years.

16. Wagner admitted to a Knoxville Journal reporter that hydropower benefits from Tellico Dam would be "relatively insignificant," KNOXVILLE JOURNAL (Sept. 23, 1964), at 1, col. 2, and flood control benefits similarly limited. See TVA EIS, I-1-49 (1972); see also DARREN A. SHULER, ON OUR LAND: PROGRESS, DESTRUCTION, AND THE TVA'S TELlico DAM PROJECT 97 (Thesis, Univ. of Georgia, 2000). The dam would have no generators. A relatively small amount of power could be derived from building a canal into one of the two adjacent reservoirs, Fort Loudon reservoir.

17. As its supersonic transport program was encountering serious problems in the mid-1960s, the Boeing Corporation looked for alternative lines of business. In partnership with TVA Boeing engineers initiated a "model city" plan to build "Timberlake New Town" based on the 1940s utopian city "Swatara" hypothesized by Athelstan Spilhaus in Minnesota, which also came to naught; Boeing pulled out in 1975. In the 1950s and 1960s TVA held a unique eminent domain power that allowed the agency to avoid courts and juries in setting condemnation prices; three commissioners employed by TVA would assess the prices to be paid, on average less than \$400 an acre.

18. Documents on file with author.

produced a theoretically profitable federal project plan. Based on these projected economics,¹⁹ TVA was easily able to engineer approval in the House Appropriations Committee, the key committee for conveying taxpayer dollars to “pork” projects in congressional districts around the nation.

The Little Tennessee River, the “Little T,” was beloved by many. The local farmers who were being expropriated for the Tellico Project’s Timberlake development and for the reservoir were quickly joined in opposition to the dam by a varied group of allies—troutfisherman who loved the river, agricultural interests in the state, and Cherokees, historians, and anthropologists who bemoaned the potential loss of unique cultural, religious, and historic values in the valley.

The project’s opponents argued (as citizen activists typically argue in environmental cases) that—

- The project’s proposed *benefits* were economically irrational and unrealistic—the hypothesized “model city” benefits depended on infeasible billion-dollar subsidies and could never occur; most recreation usage would just be shifted from the twenty-four surrounding reservoirs.

- The project’s anticipated *costs* were being grossly underestimated—including a failure to value the loss of an agricultural economy and of recreational and cultural resources,

- Attractive *alternative development designs* for the project were being studiously ignored by the agency—farmers back on their lands, tourism up through the river valley to the Great Smoky Mountains National Park, with historic sites coordinated with the farmland agriculture, and residential and industrial development at several key valley locations.

Environmental logic counsels that valid public project and program decisions should be based on accurate accounting of real overall social benefits, costs, and alternatives—a process which should be supported by both liberals and conservatives, but in practice is rarely so.

The battles over the Tellico Project continued for most of two decades. Below is a thumbnail chronology of significant dates:

1959: TVA begins planning the Tellico Project.²⁰

19. Beyond hyperbolic benefit projections, TVA economists were helped in projecting their positive ratios by the fact that due to hyper-low official discount rates they could treat the cost of taxpayer dollars as interest-free, or nearly so. Wagner also ordered his staff to apply five dubious economic axioms: 1. Without the dam project, the Little Tennessee River area would never develop economically; 2. The Tellico project would not detract from any economic benefits already enjoyed in the area; 3. If a hypothetical economic benefit *could* take place at Tellico, then it would; 4. All economic growth that occurred in the area after project completion would be attributable to the project; and 5. Project costs would not rise faster than the [low] annual inflation rate of the early 1960s. See WHEELER & McDONALD, *supra* note 3, at 92-93.

20. *Id.* at 23-45.

1964: Local citizens reject the TVA commission appointed to promote the dam; they form Assoc. for Preservation of the Little T. River (APLTR).²¹

1968: TVA pours concrete for Tellico Dam; dam structure stands idle for several years.²²

1972: The Environmental Defense Fund wins a 16-month injunction for farmers and their APLTR allies, due to TVA's failure to prepare an environmental impact statement.²³

1973: August 12: Dr. David Etnier discovers the "snail darter" in the Little T at Coytee Spring shoals;²⁴

Nov. 1: TVA prepares EIS—injunction dissolved.²⁵

Dec. 28: Richard Nixon signs the Endangered Species Act of 1973 into law.²⁶

21. See KIRK JOHNSON, A HISTORY OF OPPOSITION TO THE TVA TELlico DAM (unpublished), available at www.bc.edu/snaildarter.

22. The dam structure cost \$4.08 million.

23. *Envtl. Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

24. See David A. Etnier, *Introduction*, 80 TENN. L. REV. (forthcoming Spring 2013). The discovery is also recounted in *SNAIL DARTER & THE DAM*, *supra* note 3, at 33-34. Dr. Etnier is a nationally prominent ichthyology expert with special eminence in the realm of perch ichthyology; the snail darter is a diminutive perch. From the start it was Dr. Etnier's surmise—later confirmed in further research—that the snail darter evolved with particular adaptation to large, clean, flowing river habitats with clean substrates, a habitat type that had been eliminated elsewhere throughout the Tennessee River system by more than five dozen dams that impounded more than 2,000 linear miles of flowing river.

25. *Envtl. Defense Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

26. Pub. L. 93-205, 87 Stat. 884 (1973) (President's signing statement) "I have today signed S. 983, the Endangered Species Act of 1973. At a time when Americans are more concerned than ever with conserving our natural resources, this legislation provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage—threatened wildlife.

This important measure grants the Government both the authority to make early identification of endangered species and the means to act quickly and thoroughly to save them from extinction. It also puts into effect the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington on March 3, 1973.

Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans. I congratulate the 93d Congress for taking this important step toward protecting a heritage which we hold in trust to countless future generations of our fellow citizens. Their lives will be richer, and America will be more beautiful in the years ahead, thanks to the

1974: October 12: Plater and student Hank Hill meet with farmers and APLTR allies at old Fort Loudoun to plan a lawsuit—based on Hill’s environmental law term paper—arguing that Tellico Dam violated Section 7 of the ESA by endangering the darter’s survival.²⁷

1975: March: Boeing Corp. abandons the Timberlake project, citing economic impracticality; TVA reaffirms intention to continue project nonetheless, begins to evict landowners, bulldozing houses and barns.²⁸

June: Over TVA objections, in response to citizens’ petition, Dept. of Interior puts darter and its critical habitat on Endangered Species List.²⁹

1976: February: darter lawsuit filed in district court.³⁰

May: District judge Robert Taylor finds facts for ESA Section 7 violations, but refuses to issue an injunction.³¹

1977: January: Sixth Circuit grants injunction, saying that “[t]he district court found that the completion of the Tellico Dam would ‘jeopardize the continued existence of the snail darter,’ and, therefore, we must conclude that completion of the project would violate the Endangered Species Act. The Tellico Dam project is not exempt from the provisions of the Act.” The injunction was immediately followed by a national outburst of bemused attention for the darter and ESA. Citizens continued to push river-based alternate development plans for Little T.³²

measure that I have the pleasure of signing into law today.” *See also American Presidents Project*, UNIV. OF SANTA BARBARA, <http://www.presidency.ucsb.edu/ws/index.php?pid=4090> (last visited June 16, 2013).

27. The meeting at Fort Loudon is recounted in *SNAIL DARTER & THE DAM*, *supra* note 3, at Chapter 2. The key 1973 language of ESA Section 7 creates two causes of action: “All . . . federal agencies shall . . . ensure that actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of such endangered species . . . or result in the destruction or modification of habitat of such species which is determined . . . critical.” 16 U.S.C. § 1536 (1973).

28. The Timberlake Project was excluded from the New Community Development Act of 1975 which TVA and Boeing had hoped would grant a subsidy of close to a million federal taxpayer dollars, but it included no funds for the Timberlake project. Housing and Community Development Act of 1974, Pub. L. No. 93-383 (93d Cong., 2d Sess.) Aug. 22, 1974, effective Jan. 1, 1975. Boileau, O.C., Vice President, Boeing Corporation. March 3, 1975 Letter to Mr. Lynn Seeber, TVA General Manager: because of general economic conditions, Boeing is pulling out of Timberlake venture. *See KNOXVILLE JOURNAL*, March 6, 1975.

29. 40 Fed. Reg. No. 197, 47505-47506 (Oct. 9, 1975).

30. CIV. 3-76-48, E.D. Tenn., Northern Division, filed Feb. 18, 1976.

31. *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976).

32. *Hill v. TVA*, 549 F.2d 1064, 1075 (6th Cir. 1977).

1978: June: Supreme Court upholds injunction.³³

1979: January: Cabinet-level God Committee, created by Baker-Culver ESA Amendments, unanimously upholds snail darter injunction on economic grounds: although 95% of dam costs are spent, even total project benefits don't justify spending the remaining 5% of project expenditures; attractive economic alternatives exist.³⁴

Sept.-Nov.: Sen. Howard Baker and Rep. John Duncan push a stealth rider amendment on the 1980 appropriations bill, over-riding the ESA, the God Committee decision, and all applicable laws, to require completion of Tellico Dam; through Senator Baker's pressure the bill narrowly passes; Pres. Jimmy Carter fails to veto.³⁵

Nov. 29: a Cherokee lawsuit fails; final holdout farms bulldozed; TVA completes reservoir and impounds river. Netted snail darters transferred to several transplant locations.³⁶

1982: No development; embarrassed TVA proposes use of valley as regional toxic waste facility; citizens' outcry after media story instantly sinks toxic proposal.³⁷

Nov. 26: TVA transfers 11,000 acres to development agency; former landowners aren't allowed to make bids at the auction.³⁸

1983: TVA begins cooperation with Bentonville, Arkansas developers to create high-income resort-home development alongside the reservoir.³⁹

33. *TVA v. Hill*, 437 U.S. 153 (1978). The Supreme Court process is chronicled in *SNAIL DARTER & THE DAM*, *supra* note 3, at Chapter 9.

34. U.S. Department of Interior, Decision of Endangered Species Committee, Jan. 23, 1979 (unreported) (in archives of the Secretary of Interior, sitting as Chair), *available at* www.bc.edu/snaildarter; *see also* *SNAIL DARTER & THE DAM*, *supra* note 3, at Chapter 10.

35. The TVA lawyers who drafted the override amendment included an express exclusion not only of Section 7 of the ESA but also "*or any other law . . .*" because the citizens had discovered further potential statutory violations: the dam itself violated legal requirements for dam safety, historic preservation clearance, waterway alteration, and, potentially, Native American burial protection.

36. *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

37. *See Waste Dump at Tellico Possible*, KNOXVILLE NEWS-SENTINEL (Sept. 29, 1982), at A1, col. 1 (final home ed.); Letter from Charles Dean, TVA Chairman, to Lamar Alexander, Governor of Tennessee (May 20, 1982), *available at* Tellico Archives, Boston College Law School).

38. *See* CBS interview with dispossessed Farmers, chronicled in *SNAIL DARTER & THE DAM*, *supra* note 3, at Epilogue.

39. Cooper Communities, Inc., a private development corporation from Bentonville, Arkansas acquired 4,592 acres of Tellico project shoreland for a stated \$4,956,000 in a

1984: Extensive flatwater recreation on reservoir; several communities of high-income resort homes; light industrial development near Highway 411; darter transplants look sufficiently established to allow downlisting to “threatened.”⁴⁰

The chronology reflects thousands of hours spent by the river defenders in Tennessee, their allies in Washington, TVA staffers including the Law Department managing the offensive against the snail darter, and literally hundreds of Washington participants in administrative agencies, Congress, and the various anti-regulatory lobbying corps.

The history of the case (particularly evident in the unanimous 1979 economic verdict of the God Committee concluding that the citizens opposing the dam over the past sixteen years had been thoroughly correct and TVA and its power bloc thoroughly wrong) reflects that the Tellico Project’s dam design had not only been economically unjustifiable from the start. With 95% of the project costs expended it was also still unjustifiable. The project destroyed more existing and potential public value than it created. And yet, despite the dysfunctionality of the dam on the demonstrated official record, the nation’s political establishment had forced the river impoundment into existence.

What is not consistently evident on the face of this summary chronology of the darter case is the ever-present significance of how the media treated the controversy. At every stage, however, the impact of how the media reported or did not report the facts of the case had fundamental significance on the citizens’ ability to intrude the actual merits of the case into the processes of national governance.

IV. A LINEAR HISTORY OF TELLICO PROJECT MEDIA COVERAGE ISSUES

Over the years of the snail darter controversy, the coverage, and non-coverage, of the case by the media had profound direct impacts upon how the organs of government reacted to the decisions presented by the conflict between the fish and the Tellico Dam. From the start the citizens were

partial cash purchase. One executive was quoted as saying the company would rather have developed along a river—as they had in Arkansas’s White River region—than on the banks of a reservoir. Ultimately there were five major resort home development companies to which land was transferred to develop the project area. One has recently been reorganized in bankruptcy.

40. For data on Tellico development, see *Tellico Industries and Products*, TELLICO RESERVOIR DEVELOPMENT AGENCY (2007), available at http://www.tellico.com/libraries/tiny_mce/tinymce/plugins/filemanager/files/TRDA%20Prospect%20Booklet.pdf. For notice of snail darter downlisting, see Fish and Wildlife Service, 49 Fed. Reg. 27510-01 (July 5, 1984) (to be codified at 50 C.F.R. pt. 17).

aware of the potential importance of media coverage, and worked hard trying to pull journalists into recognition of the dramatic critical facts lying at the heart of the case.

What follows is a linear sequence recounting some of the media contacts and considerations that occurred over the history of the case in the years after the discovery of the endangered darter.

A. At the Fort

From the very start of the snail darter case, at the potluck dinner meeting of farmers and their allies at old Fort Loudoun that launched the lawsuit, it was clear that an endangered species case against a dam would initially be received by the media and the public as somewhat humorous, a David and Goliath exchange that was more likely to be received as ridiculously disproportionate rather than heroic.

A strong attempt was made that night to persuade the farmers to name the case “Tellico Farmers v. TVA.” Doing so would mean that reporters would immediately go to see farmers being condemned or dispossessed; America would learn of the extraordinary eminent domain/corporate resale justification claims for the project, and public debate would then illuminate the project’s fabricated merits.⁴¹ The farmers, however, insisted that they could not be the named plaintiffs. They had brought the 1972 NEPA case. To bring the second suit would be seen locally as an unfair “second bite at the apple.” They promised, and proceeded, to work diligently over the next several years to support the darter litigation, but the case would be named for their University of Tennessee supporters.⁴² In retrospect, given the importance of the media coverage and the narrowness of the citizens’ ultimate defeat, if the case had been named “Tellico Farmers v. TVA,” the Little T River might still be flowing.

In the evening meeting at Fort Loudoun the citizens expressly discussed a hope that after the first flush of “fish-bites-dam” stories, after the first week or two, reporters would have to look deeper into the merits of the case

41. TVA’s condemnation resale calculations were even criticized by the Army Corps, and attracted the opposition of the U.S. Chamber of Commerce. The national reaction to the Connecticut eminent domain development scheme in *Kelo v. New London*, 545 U.S. 469 (2005), reflects the volatile national political antagonisms that would predictably have supported the Tennessee farmers’ case against the dam from the start.

The debate on how to name the case is discussed in *SNAIL DARTER & THE DAM*, *supra* note 3, at 54-55. On the duty of progressive lawyers to respect the wishes of informed potential clients, see P. BERGMAN & P. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3d ed. 2011).

42. The initial style of the case was “Hiram Hill, Zygmunt Plater, and Donald Cohen v. TVA.” Subsequently the Association of Southeastern Biologists, created by Dr. Etnier and his associates, and the Tennessee Audubon Council, were joined as plaintiffs.

for more of the story, and everything they'd find would bolster the case for the fish and its river valley rather than for TVA's dam. It is a symptom of the systemic problem addressed in this article that to a substantial extent over the following years of intensive media coverage that never happened, and the river and its valley were lost.

B. Trial

Media coverage of the snail darter case in Tennessee was almost universally superficial throughout the years of controversy. The local Tennessee dam opponent groups⁴³ continually tried to get reporters to scrutinize the fabricated economics of the project and the extremely promising local and regional economic benefits available with an alternative, river-based development design for valley lands. In story after story, in print and electronically, the local press coverage usually framed the controversy solely in terms of the fish versus the dam. To the extent that the press noted the citizens' case against the dam's economics, it would be to state in general terms their argument that the dam was economically unsound. No article ever examined the official item-by-item TVA justifications for the dam.⁴⁴ And despite years of citizen attempts,⁴⁵ no

43. The farmers, the plaintiffs, and their allies formed several Tennessee groups to coordinate opposition to the dam—notably the Tennessee Endangered Species Committee and the Little Tennessee River Alliance—which spoke at TVA public meetings, wrote letters to editors and state and national political leaders, and raised money through potluck dinners, sales of snail darter t-shirts, and the lithographic print of the snail darter that was admitted as Exhibit 12 at trial.

44. The official benefit justification for the dam varied over the years, but the version in the Tellico Project EIS is typical:

Direct Annual Benefits Claimed [in 1973 dollars]

Flood control	\$505,000
Navigation	400,000
Power	400,000
Recreation	1,440,000
Fish and wildlife	220,000
Water supply	70,000
Shore land development [Timberlake]	714,000
Redevelopment	15,000

Total direct annual benefits: \$3,760,000

Annual Costs:

Interest and amortization	\$2,045,000
Operation and maintenance	205,000

Total annual costs: \$2,250,000

article, print or electronic, ever presented the local Tennessee public with the existence of lucrative alternative development options for the river and its valley.⁴⁶

The darter trial in Knoxville was a big local story on the evening news, with an artist's watercolor rendering of David Etnier looking closely at several darters in test tubes appearing on television and local counsel Boone Dougherty interrogating TVA's biology expert. But the coverage was disappointingly limited. The two local papers' headlines were "Darter Has Its Day in Court," and "Environmentalists Present Case in Federal Court." Nothing about the biological destruction, much less anything questioning the economic merits of the dam. One activist, Sara Grigsby, had tried to get reporters to interview the farmers attending the trial, hoping the story would cover the human and economic background of the case. Nothing was mentioned about the homes and fields condemned for re-sale development. Nothing about development alternatives. For whatever reason—a narrow journalistic mindset or Judge Taylor's truncation of the trial evidence—the press coverage of the trial was all local and all darter.

C. *The Sixth Circuit Injunction*

The snail darter story exploded nationally when, on January 31, 1977, the United States Court of Appeals for the Sixth Circuit, sitting in Cincinnati, unanimously reversed the local Tennessee judge's dismissal of the case and ordered that the Tellico Project be enjoined.⁴⁷ Predictably, the first reaction of the press coverage was the classic caricature. The snail darter case was a clash between environment and economic progress, a

Cost-benefit ratio:

1.7:1.0

See Tennessee Valley Authority, Tellico Project Environmental Impact Statement, vol. I, 1972, 1-49 (both the General Accounting Office review (1977) and the God Committee review (1979) concluded that all figures in this ratio were inaccurate). "The annual benefits [in 1980 dollars] . . . are \$6.5 million, compared to annual costs of \$7.25 million." See *infra* note 62 and accompanying text.

45. Including extensive descriptions of alternative development designs and maps repeatedly placed in press packets and in the citizens' briefs to the courts and presented in a University of Tennessee School of Architecture study of Little T River Alternatives.

46. The media reluctance appears to continue to the present. During the thirty-year commemoration of the battles over the Little Tennessee River, an op-ed article and map featuring the valley's foregone tourism, agriculture, residential, and industrial alternatives was submitted to the local press but never achieved publication. No article or airtime has ever presented the alternative development that had been advocated for years by the river defenders.

“three-inch minnow” counterpoised against a “huge federal hydroelectric dam.”

The conservative talk radio syndicates around the country characteristically jumped on the darter story as a parable of governmental regulatory stupidity, a case where animals and plants were being given precedence over the desperate energy needs of humans. Over the following three years, the darter appeared repeatedly in newspapers and newscasts around the nation, but the coverage was uniformly shallow, feeding a continuing drumbeat of ridicule of the fish, and criticism of the Endangered Species Act as “too rigid, too extreme,” favoring environment over economics. Even the major national newspapers of record replicated the narrow surface caricatures, failing to report the engaging details of the Tellico Project’s contentious merits, questionable justifications, and the public resources and available alternative designs at stake.

The *New York Times*, for example, in a feature article two months after the appeals court victory, reported the darter-dam story in a manner that exemplified most of the national coverage then and thereafter. Carrying the headline “Giant TVA Stalled by Controversy over 3-Inch Fish,” the March 22 story declared—

LENOIR CITY, TENNESSEE. [It is] a classic struggle between ecology and economics, [between] the huge earth-and-concrete Tellico Dam [and environmentalists] who reject . . . arguments that the dam would be an economic boon to the area. They are not concerned that they halted the impoundment . . . after more than \$100 million had been spent . . . [quoting Dave Etnier] “the fish is more important than the dam.” . . . Nellie McCall is adamantly against the project . . . “The whole thing is just another land grab.” [A local businessman, on the other hand, says] “It’s a mess . . . Things have gone too far to turn back for a little fish and we ought to finish it.” . . . Aubrey J. Wagner went to Washington to plead with Congress to “balance” the Endangered Species Act . . . Now at stake is the Endangered Species Act [itself]: as interpreted thus far by the courts, the Act does not permit [sensible balancing].³

The article parallels the media’s typical framing of the story:

- Public policy needed to choose between ecology and economics—we implicitly can’t have both. Quoting Wagner the article said the Act placed “*human* needs . . . well down our list of environmental priorities . . .”
- The snail darter story was in reductive terms simply a little fish causing economic losses by blocking a huge (and implicitly hydroelectric) dam.
- Tellico is referred to as a “more than \$100 million” dam, ignoring the fact that the majority of the budget was being spent for roads, bridges, and land condemnations, the dam itself only a small fraction of the total.
- There was no mention that the dam project had been justified on the basis of recreation and hypothetical real estate development, not power or

flood control, and that Boeing had abandoned the city development plan two years earlier.

- The citizens resisting the dam are identified as “the environmentalists” who either care only about the fish, as in the quotation from Dr. Etnier, or care about the fish only to stop development.

- There was no mention of available alternative development designs for the valley, much less the inherently more economically valuable and readily available tourism route up through the valley to the National Park.

- If the press quoted landowners, as the *Times* reporter here quoted Nell McCall, it’s always implied that their lands are being taken for a power generation reservoir; the reporters did not explain that most of the 300 family farms were being taken for resale in the corporate real estate scheme that Boeing Corp. had in fact abandoned.

- Like most articles, the *Times* story also adds the knowing prophesy that the snail darter case now endangered the survival of the Endangered Species Act itself, noting inaccurately that other big projects were being halted by the ESA.⁴⁸

In these elements, the *Times* story, like most stories on the case, skipped superficially over all the core issues integral to the public policy question presented in the Tellico controversy. Even more distressing, like many national reporters, the *Times* reporter who wrote the article, R. Drummond Ayres, had actually visited Tennessee to investigate the story. Members of the river defender groups had spent time briefing him, taking

48. In the Circuit Court decision *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), Judge Wade McCree concurred separately, stating the stark essence of the case: “The district court found that the completion of the Tellico Dam would ‘jeopardize the continued existence of the snail darter,’ and, therefore, we must conclude that completion of the project would violate the Endangered Species Act.” *Id.* at 1075. The author observed Judge McCree taking copious notes, he thought, during the oral argument, but it turned out he actually was writing a limerick:

Who can surpass the snail darter,
the fish that would not be a martyr?
It [expletive-d] the dam,
near the place where it swam.

Can you think of a fish any smarter?

The Act forbids completion of construction projects that would wipe out the habitat of any living thing rated as endangered. In Maine, for instance, the Act is being used to stall plans for a big hydroelectric project because an endangered snapdragon might be wiped out.

The latter statement references the fact that “Furbish’s lousewort,” an unfortunately named endangered plant in Maine, had been discovered within the boundaries of the Army Corps of Engineers’ Dickey-Lincoln power dam project in Maine. That dam, however, was being successfully challenged by the National Audubon Society because it lacked an adequate environmental impact statement under NEPA. The endangered species issue had been raised only by the Corps itself, presumably to generate public ridicule against the ESA and those who were criticizing the dam project.

him around the valley and into their homes. He had visited with Asa and Nell McCall. The *Times* article, however, didn't question TVA's "economic boon" claims, nor mention that the fish's survival might bring far more lucrative river-based economic development options, nor note that most of the "\$100 million" expenditure was for beneficial infrastructure, not for the dam. The *Times* article cited Nell's pain at losing her farm but didn't note that most of her land, like most of the thirty thousand-plus acres of private land condemned by the government, was actually being taken for private corporate real-estate development, not for a reservoir, and it wasn't a hydroelectric dam.

D. Post-Injunction Political Coverage: Washington, D.C.

This kind of news reporting too easily made the snail darter and the Act the butt of anti-environmental jokes and outraged oratory around the country. Paul Harvey, the acerbic faux-populist radio commentator, regularly used the darter as an example of environmentalism and regulatory government run amok. Ronald Reagan, who after leaving the governorship of California had resumed his syndicated media commentaries for the electric power industry, complained that the darter's blocking of a "dam [designed] to generate electric power" shows "the absurdity of the present endangered species law which gives priority to tiny fish, weeds, and spiders regardless of the merits of any proposed project."⁴⁹

Editorials around the country echoed the same cant:

"Snail Darter: Example of Extremism"

"Snail Darter: Absurdity for Environmentalism"

"Environmental Overkill"

"Environmentalists' Newest Allies Kill Job-Making Projects"⁵⁰

The "extremism" narrative that prevailed in the media—greatly fueled by industry newsletters and public relations—consistently served to strengthen political attacks against the Endangered Species Act, environmental laws, and progressive regulation generally.

The citizens' efforts in Washington to drum up informed coverage affirming the Endangered Species Act as well as the darter gained little traction. Every week they put together new press briefing packets. Volunteer interns from the national environmental groups spent evenings

49. Ronald Reagan, radio broadcasts, October 18 and 29, 1977, quoted in KIRON K. SKINNER, ANNELISE ANDERSON, & MARTIN ANDERSON, *REAGAN'S PATH TO VICTORY: THE SHAPING OF RONALD REAGAN'S VISION: SELECTED WRITINGS* 214, 231, 367 (New York Free Press 2004).

50. See, e.g., *TOLEDO BLADE* (Jun. 26, 1978); *KNOXVILLE NEWS-SENTINEL* (Dec. 3, 1977); *MILWAUKEE JOURNAL* (Feb. 2, 1977); *SPOKANE SPOKESMAN-REVIEW* (Jun. 17, 1977); *NEW YORK TIMES* (Mar. 14, 1977); *NEWS-TRIBUNE* (Rome, New York) (May 9, 1978).

collating stacks of photocopied pages on the floor of Friends of the Earth and mornings dropping these packets into mailboxes at the National Press Building and other media offices around town. No discernible changes in coverage came from these efforts, however. The Associated Press wire service—with its constant electronic feed to more than six thousand American newspaper, radio, and television newsrooms—continued to carry the standard boilerplate darter-dam clichés around the country, not the essential facts. As one volunteer mused dourly, “If a tree falls in the wilderness, and it isn’t covered by the Associated Press newswire, did it really happen?”

Every month, a few carloads of farmers or representatives of the Eastern Band of Cherokees came to Washington. They would try to get the Tellico Dam story through to the media and also walk the halls of Congress. They set up news interview opportunities so reporters could see real people who had a personal stake in the snail darter’s case.

Despite the repeated references being made to the case in the media, getting through to the press was difficult. One example: a press conference arranged in May 1977—a press packet was sent to four dozen journalists’ offices in the National Press Building, and a major interview notice posted in the Washington press’s “Daybook,” the listing sent to all media offices each morning:

10:30 a.m. Cannon House Office Building, Front Entrance Portico, Independence Avenue—Press Availability: endangered species—the TVA Tellico Dam—Meet with Tennessee farmer dam opponents whose land is being condemned, and a Cherokee representative on the ancient history at stake.

The group of Tennesseans gathered by the Cannon portico at 10 a.m., rehearsing elements of the story to be impressed upon the reporters. Displaced farmers Nell McCall, Alfred Davis, and Jean Ritchey sharpened some barbed lines about the misrepresented nature of TVA’s land condemnations. Nell, visibly frail, had her daughter Margaret and son-in-law, Joe Sexton, along with her at the portico. Laura King was a quiet but regal presence for the Cherokees, ready to speak with forceful passion when the time came. The Tennesseans waited. And waited. As a dispiriting hour passed, no reporters came. The little group squared its shoulders and marched off to the corridors of the Capitol, Jean leading the way, looking for politicians to lobby. This was hard to take. Since Nixon and Watergate they’d been hearing about the notorious liberal press. Shouldn’t the liberal press have taken an interest in a story like this? Where were they?

Over these months the darter groups talked with more than a hundred individual reporters working for the big networks, National Public Radio, the newswires, and a host of newspapers and magazines—speaking with some of them more than a dozen times. Walter Cronkite, the dean of American journalism, directed two of his CBS researchers to talk with a

representative of the Tennesseans. They spent an hour going through the data, taking copious notes. That evening the darter groups tuned in to the six o'clock news hoping to hear Cronkite at last tell the American public the awkward realities of the Tellico Dam. It didn't happen. Cronkite began the segment with, "We all have heard about the three-inch minnow that has stopped a \$150-billion [sic] hydroelectric dam . . ." and the story went downhill from there, quoting politicians saying that the injunction was a fluke and would soon be reversed in the political process because the snail darter case made no sense.

Through Washington environmental contacts, the Tennesseans got a long interview with a reporter from the *Wall Street Journal*. He paid close attention to details of the Tellico Project's shaky economics, with the Tennessee maps laid out to show the broad extent of condemned private farmlands. He was clearly impressed, saying that the dam project looked like a classic pork project, basically irrational in economic terms. Good. When would he do the story? "Oh, I can't write this," he told them. "It goes against our editorial policy." But, the darter representatives remonstrated, he was a *news* reporter for the *Journal*, not writing for the editorial page." That wasn't the point, the reporter replied. "Our policy is not to publish articles like this." He didn't clarify what "articles like this" meant, and after two wasted hours he departed. The *Journal* later published an editorial criticizing the Endangered Species Act, noting "all the dams and energy projects" that had been foolishly halted by the Act.

Through luck and several strategic assistances from some environmental groups in the capital, the Tennesseans were able to prevent a lightning attempt to pass a statutory override nullifying the Sixth Circuit's injunction led by Senator Baker.⁵¹ As the political turmoil over the dam continued to churn, however, it was clear to the citizens that Congress responded to the press far more than to individual citizen groups.

E. Senate Hearings

Major Senate hearings were held on the snail darter and the Endangered Species Act in July 1977.⁵² The darter defense group expected major press

51. Shortly after the injunction was ordered, Senator Baker had announced he would push an override through the Congress, in the same way that a "blackbird bill" had been passed in two days time clearing the way for authorities to poison hundreds of thousands of starlings that were covering the Fort Knox area with guano; the bill passed but the poisoning did not work very well. The political turning point in preventing a similar snail darter override was when Robert Leggett, the House subcommittee chair for the relevant committee, declared that there would be no more blackbird bills on his watch. See *THE SNAIL DARTER & THE DAM*, *supra* note 3, at 138.

52. Endangered Species Act Oversight: Hearings Before the Subcomm. on Resource Protection of the Sen. Comm. on the Envtl. & Pub. Works, 95th Cong. 6-23, 133-76, 178-

attention. The snail darter was continually being mentioned in industry trade newsletters, newspaper editorials and letters to the editor, and the potential need for hearings had been a major argument against a quick-strike override amendment. But the Senate committee staffers and the Washington environmental lobbyists advised that the darter group make special effort to ensure that the press came to the hearings. Having reporters at hearings is a major determinant of whether the hearings have any impact at all.

As the Senate endangered species hearing began, no reporter had shown up, and only two junior senators were at the dais. The chamber door behind the dais opened and Committee Chairman Jennings Randolph lumbered in and took a seat. Senator Randolph sat at the dais with a blank look on his face, exhibiting little awareness of what was going on. After fidgeting for a few minutes he had an aide pass a scrawled note to the Tennesseans' representative: "Where's the *Post*!?"

It was a bad moment. One of the darter defenders had tried to pull a fast one, calling the senator's staffer the day before, urging Chairman Randolph himself to come to the hearings because a reporter from the *Washington Post* would be there. The mention of the *Post* clearly made an impression, but in truth, Margot Hornblower of the *Post* had said only that she *might* be there. So the darter group had called her at home before breakfast that morning to say she should attend the hearing because the full committee would be there. The reporter said that if the Committee Chairman was coming, she'd be there. Now Senator Randolph was there, but the reporter wasn't. Randolph fidgeted some more, and glanced at us irritably. Ten minutes later, however, the *Post*'s reporter swished into the room and took a seat. All three senators immediately took notice and shifted forward in their chairs. Chairman Randolph furrowed his brow, focused his gaze on the witness who was speaking, and to all appearances began listening intently.

The hearing's first day, however, did not feature any emotional moments or confrontations. The *Post* article ran on an inside page and was anodyne. Headlined "Wildlife Species Act Endangers Project; Change in Law Opposed," it almost totally bypassed testimony emphasizing the Endangered Species Act's administrative successes, instead focusing on the law's supposed potential for obstructing economic development. "The ESA may be endangering 52 projects ranging from the \$4-billion Tennessee-Tombigbee Waterway to small stream-dredging operations in Virginia and Maryland."⁵³ That had not been said in the hearing; it apparently had been pulled from a memo from Senator Baker's office, with an added quote

300, 357-93, 516-49 (July 20-22, 1977).

53. Hornblower, *Wildlife Species Act Endangers Project; Change in Law Opposed*, WASHINGTON POST, Jul. 21, 1977, at A3.

criticizing the law's inflexibility. The article mentioned the Tellico conflict only briefly near the end, saying there might soon be an economic reassessment.

The Senate hearings in two following days produced some sterling moments, but Americans saw virtually none of it. There was no television feed, and the hearings were barely mentioned in the papers except for a few brief paragraphs the day after. Details about Tellico Dam economics from a scathing report from the Government Accounting Office, the bountiful benefits of river development demonstrated by the Hanson Study, the farmers' land losses, and the Act's affirmative track record—none of these were picked up by the national press.⁵⁴

Even when reporters were following the story, their editors often did not seem interested in having them dig into the issue. Ward Sinclair, a *Post* reporter, apologized that all he could get his editors to accept were stories on the political backlash against the darter and the Act; even so the only way that he had gotten a recent story into the paper had been a fluke. He had written that the darter case was starting a "*pork panic*." When the headline writers saw that, they had put it up at the top of the piece: "'Pork Panic' Sweeping Congress in Wake of Darter's Rescue." His editor hadn't wanted to run the story, Sinclair said, "but with a headline like that he had to."⁵⁵

Perhaps a scandal could trigger press attention? Hank Hill discovered recorded deeds where TVA General Manager Lynn Seeber and his wife had bought more than a dozen land parcels around the project area during the time that Seeber was making decisions whether or not to halt the project in compliance with the federal law, a clear conflict of interest. And Seeber himself, as General Manager, was the official in TVA responsible for policing ethics and conflicts of interest. No Tennessee media would run the story. "It implies Seeber's bad faith," said Ernie Beazley, a sympathetic

54. Prior to the hearings the Tennesseans were able to instigate an investigative report to Congress on the economics and alternatives to the Tellico Dam done by the GAO (then known as the General Accounting Office, subsequently renamed the Government Accountability Office). The Comptroller-General's team concluded that TVA's justifications for Tellico "do not give a truly valid picture," were "statistically weak," and were "inflated." The GAO report ended with an unusually decisive "Conclusion and Recommendation to Congress: Congress should prohibit by law the Authority from spending any more appropriations for work on the project that would further endanger the darter" or be wasted if the dam was not completed. See Comptroller-General of the United States, Report to the Congress: The TVA's Tellico Dam Project—Costs, Alternatives, and Benefits, EMD-77-58 (Oct. 14, 1977), and SNAIL DARTER & THE DAM, *supra* note 3, at 183-187, 201. Reinforcing the author's recollection that no national press story reported the GAO's dramatic report, a LexisNexis search revealed only one story even mentioning the study, written almost a year later. See Dick Kirschten, *Acting on Endangered Species*, NAT'L. J., Jul. 22, 1978, at 1176.

55. Ward Sinclair, "Pork Panic" Sweeping Congress in Wake of Darter's Rescue, WASHINGTON POST (Jun. 28, 1978), at A2.

Knoxville Journal reporter. "My editors would say it's slander. We won't touch it." Attempts to get the Seeber deeds story into the national press fared no better. Jack Anderson, the national gadfly muckraker, initially showed interest, but after reviewing the deeds and project specifics, decided that it was a local matter with too many complicated details for a national audience to understand.

In Washington, the darter groups continued to try to awaken press coverage to draw attention to the real merits of the case. In anticipation of an upcoming Senate vote an Associated Press reporter, David Espo, joined some of the darter volunteers for an informal picnic lunch out on the Capitol lawn, lured by an attractive female volunteer. He listened to an array of detailed facts on the project's economics and alternatives, but he laughed wryly when asked to do an analytical story prior to the congressional debate. "You'd like us to do a story now, right? To get information out before the vote. We won't do it. We aren't supposed to *make* news, we just report it." Informing the public and political process in advance of significant decisions, he said, was not the Press's role. Madison and Jefferson would sigh in dismay.

The darter campaign did encounter, however, several hopeful media breaks. In the late summer after the Sixth Circuit injunction, both CBS and ABC sent film crews to the valley to do stories on the battle on the Little T. The farmers and other volunteers in Tennessee spent hours with each of them.⁵⁶ The crews went back to New York and the Tennesseans waited for the stories to run. They didn't. As the producers explained, the networks couldn't find a niche to run the stories. ABC producer Aram Boyagian said the network had done a lot of environment stories lately. Reminded of the Cherokee angle, he said that the network had done a lot of Indian stories, too. So what would they need as a "hook" to run the story they filmed? The answer I got: if they "find Senator Baker schtupping a milkmaid along the banks of the Little Tennessee River," *that* would probably be enough of a hook. What gets presented to the public apparently is determined by the management's sense of what will grasp or entertain the fickle interests of the public.

F. The Supreme Court

The context of the Supreme Court arguments and decision also offered missed opportunities for the media to grasp and communicate the facts of the case. The citizens' brief and oral argument were laden with analysis of

56. CBS's Al Wasserman and his crew made multiple trips, getting to know many of the farmers and the mordant details of TVA's land condemnations for resale. Harry Reasoner for CBS's 60 Minutes probed the project's economics. With producer Aram Boyagian, ABC's Roger Anderson of the television news magazine 20/20 were interested in the David and Goliath angle of the battle between local citizens and TVA.

the facts and merits of the case as much as the law of it, but media coverage of the Court proceedings continued to focus simplistically on the juxtaposition between the little fish itself and the implicitly valuable dam, as well as noting the legal question whether an injunction was appropriately issued.⁵⁷

When the Supreme Court decision dramatically upheld the Sixth Circuit injunction eighteen months after it had been issued, the story was bannered on the front pages of major newspapers and evening newscasts across the nation.⁵⁸ The text of the stories, however, did not reflect the substantive elements of the agency's justifications for the dam or the citizens' arguments against the dam and for the beneficial alternatives.⁵⁹

G. *The God Committee*

Whereas the Court's affirmance of the darter halting the dam had gotten national front-page coverage, when the Cabinet-level God Committee issued its dramatic verdict six months later—unanimously concluding that the project had never been economically justified, wasn't worth finishing, and that beneficial alternatives still existed—the national media largely ignored the story or ran brief summaries reciting the Committee's verdict but not specifying the facts that produced it.⁶⁰ The turned-table story of the

57. The briefs filed in the case are accessible in the snail darter website document archive. *Digital Commons*, BOSTON COLLEGE LAW SCHOOL, www.bc.edu/snaildarter (last visited May 29, 2013). On the Supreme Court steps, after oral argument, the author missed a prime opportunity to force the facts into media consciousness. After the Attorney General had brandished a little bottle containing a dead snail darter for the cameras, the author made comments focusing on the statutory violation rather than the dam's merits and alternatives or the project's expansive farmland condemnations. Further opportunity was lost the day of the Court's decision. See *SNAIL DARTER & THE DAM*, *supra* note 3, at 264-65, 268-69.

58. Morton Mintz, *Court: Dam Must Yield to Snail Darter*, WASHINGTON POST (Jun. 16, 1978), at A1. A *New York Times* article by Warren Weaver also ran on A1, as did the story coverage on many of that day's papers.

59. In the June 1978 *Washington Post* article, for example, the story contained more than 1,000 words, but the only reference to the project's economics and alternatives that had been emphasized in oral arguments and multiple press releases delivered to the Capitol media was to note "the dam . . . would, in violation of the law, inundate the only known habitat of the darter in the Little Tennessee River, as well as 16,500 acres of valuable farmland and native American and Cherokee Indian archeological sites," and quoting David Freeman that alternatives "may even produce greater benefits for the people." Mintz, *supra* note 57, at A1 (emphasis added).

60. A typical example of the Associated Press wire story: the *Pittsburgh Post-Gazette*, on January 24, 1979, ran the first seven paragraphs of the wire text, mentioning none of the dramatic negative economic analysis.

Two of the bottom paragraphs in the full fourteen-paragraph wire text did contain quotes indicating an undefined "reasonable alternative" and annual operating costs exceeding

H. The Override Amendment

When TVA and its allies in the public works and anti-environmental industry blocs in the capital inserted the stealth rider onto the annual TVA appropriations bill removing the protections of the Endangered Species Act “or any other laws” from the snail darter and the Little Tennessee River, several major newspapers wrote editorials decrying the unfair parliamentary maneuver.⁶¹ Again, however, beyond the magazines and newsletters published by the national environmental citizens organizations,⁶² the merits and demerits of the project itself and the existence of beneficial alternatives were not visible in the national media coverage.

Just before the final vote in both the House and Senate, Secretary Andrus, who had supervised the God Committee’s ninety-day economic review and chaired the Committee deliberations that had condemned the dam project’s economics sent an urgent letter to all 535 Members of Congress.

I wish to express our grave concern Last year Congress directed a special seven-member committee which I chair to determine whether the dam should be exempted from the Endangered Species Act After due consideration we found that . . . the project is not justified. In fact, when the committee compared the full range of project benefits against only the remaining costs of completing the Tellico Dam . . . we found that [just the remaining] costs of the project exceed its benefits. We also found: The annual benefits . . . are \$6.5 million, compared to annual costs of \$7.25 million; . . only \$22.5 million has been sunk into actual construction of the dam; . . . Tellico does not meet current BuRec standards for dam safety; . . . energy benefits [are minimal]; . . . one third of annual project benefits are justified on the basis of flat water recreation, [ignoring] 24 other [dams] within a 60-mile radius; . . . free-flowing river [recreation benefits] exceed those of the dam by \$600,000 a year; . . . Tellico reservoir would tie up approx. \$40 million in private [agricultural] land values; . . . [and other] serious economic problems⁶³

61. A *New York Times* editorial, for example, declared that “This sort of thing endangers more than fish.” Editorial, *Looking Down*, NEW YORK TIMES (Jun. 20, 1979), at A22, col. 2.

62. The national environmental citizen groups regularly carried stories in their publications analyzing the faults of Tellico Dam and emphasizing the common sense merits of the case for the snail darter and the river; the green media, however, clearly did not penetrate to mainstream America or the mainstream press.

63. Secretary of Interior Cecil Andrus, Chairman of the Endangered Species Committee, Letter to Members of Congress: Re: Tellico Dam Decision of the Endangered Species Committee, Jul. 16, 1979, available at www.bc.edu/snaildarter.

Ultimately both chambers voted for the targeted Tellico Dam amendment to override the Supreme Court decision and the God Committee economic verdict.⁶⁴ After the God Committee process and Secretary Andrus's powerful letter, it is clear that the Members of Congress who voted in the majority for the override all knew the true merits of the issue. But they also knew that America did not know, and therefore, absent public cognition, were free to cast the vote based on the pork politics that so often characterize congressional voting instead of on the demonstrated public interest.

I. The White House

At the urging of the Carter White House, the Tennesseans and their capital allies collected voting commitments from legislators in both House and Senate amply sufficient to uphold the President's veto (as only one chamber is needed to uphold a veto).⁶⁵ President Jimmy Carter prepared a veto message, but in the end, he signed the bill with the override amendment attached. According to the account of a White House staffer, Carter was prepared to veto the bill until he was persuaded otherwise by his congressional liaison, Frank Moore. Reportedly Moore had said that if the President vetoed the bill, "tomorrow morning every editorial cartoonist in the nation will have a drawing of you holding a snail darter in one hand and a killer rabbit in the other. You just can't stand that kind of ridicule in the press."⁶⁶ (During a fishing trip, the President's boat had been approached by

64. The House voted 214 to 184 to override the Supreme Court and the God Committee. House Roll Call No. 427, 125 Cong. Rec. 21,987-22,011 (Aug. 1, 1979). In the Senate, after two rejections of the stealth rider, the House version of the appropriations bill with rider attached passed Senate by four votes (after Senator Baker halted the vote and persuaded four colleagues to change their cast votes from "nay" to "yea") and was sent to President Carter. Senate Roll Call Vote No. 269, 125 Cong. Rec. 23,863-872 (Sept. 10, 1979) (TVA winning forty-eight to forty-four, including eight abstentions).

65. The citizens clearly had confirmed sufficient votes to block an override of the veto that President Carter's staff indicated was coming. To override a presidential veto, both chambers must vote by at least two-thirds. Thus on the Senate side, thirty-four of one hundred senators are needed to block the two-thirds majority that can override a veto; at White House's behest, the darter group gained firm commitments from forty-one senators of the forty-four who had supported the darter in the Senate vote, like South Dakota's Tom Daschle, whose aide said he hadn't realized what his prior vote had meant. In the House, where 146 out of 435 are necessary to block the override of a presidential veto the darter group had confirmed strong commitments from almost 170.

66. The non-veto story was relayed by Marion Edey, of the President's Council of Environmental Quality. Carter later explained the "killer rabbit" story that caused a media tumult to CNN's Howard Kurtz: a rabbit was being chased by dogs, jumped into the water, and swam toward the boat; the picture of the President fending off the rabbit with a paddle was amplified into his dodging an attack. Cody Combs, *Jimmy Carter explains "rabbit*

a swimming rabbit; a photographer snapped a picture of the President fending off the “attacking” “killer rabbit,” and the press had reverberated the story for weeks.) That perhaps was what finally pushed the President to sign the bill. The cautionary point is that in fact it *might* be true, which underscores how years of citizens’ work building a case on the merits could be overturned by a president’s fear of media coverage. A president who wanted to make the right decision in the public interest—backed by law, facts, economics, common sense, and more than enough votes to support his veto in both chambers—was unable to do so because of his own shaky media stature and because public opinion had been skewed by years of journalism’s negligent performance of its public information role.

The morning after President Carter’s non-veto, the Tennesseans announced a press conference in protest. This time their hopes for reporters’ attention were fulfilled; the room was jammed. Why now, finally? The reporters listened, scribbling notes as the Cherokees described the beautiful valley and its unique place in their history and culture. They asked questions as the maps were shown and facts presented about how it was a recreation project and a land development scheme, not a hydroelectric dam, with proven diseconomies, condemnation of farmland for resale, and more.

Doesn’t this seem like a huge mistake, the citizens asked? How could the president, the Congress, the agencies, how could *the Press* have let this happen? A reporter in the front row reacted with a yelp, Phil Shabecoff of the *Times*, a pioneer in covering environmental stories. “How can you say that?!” Shabecoff asked. “How come it’s only *now* we hear all of this? About the farmers’ land being taken for real estate development, about benefits getting so inflated, about Cherokees. Why weren’t we told this long ago? It’s a story that the American people needed to hear!” The Tennesseans erupted at that, noting that they had been trying to get reporters to cover this exact story *for almost three years* with dozens of information packets delivered at the press buildings, with photos, maps, explanations of how this dam was an economic disaster; quotes and information from the God Committee decision; press conferences with farmers when *no reporters* came. Shabecoff looked chastened, but it was too late. The press had just never gotten around to paying attention until the case’s conclusion.

J. Tellico Dam, Post-Closure

In the years after the final impoundment of the Little Tennessee River, the state's press has rarely mentioned the Tellico Project controversy, and the snail darter nationally and regionally remains an anachronism.

The affirmative power of a focused press, however, was vividly demonstrated two years after the dam's closure. In September 1982, the author received a clandestine tip from contacts within TVA that the agency, embarrassed by the absence of project development, was preparing to propose the development of portions of the project lands along the reservoir for a regional toxic waste disposal facility. When the author passed the leaked information to the local United Press newswire, however,⁶⁷ where it quickly went viral, TVA abandoned the plan within just twenty-four hours.

V. WHY DID THE PRESS NEGLECT THE MERITS OF THE DARTER CASE?

The foregoing chronology of intersections between the snail darter, the three official branches of national government, and the media repeatedly illustrates both the importance of accurate communication of significant information to the public and the deficits in the political process and political accountability when basic essential information is not communicated.⁶⁸ It is altogether probable that if the press had communicated the true economics of the Tellico Project to the Tennessee public—and even more important the available alternative development options that were far more valuable to the regional populace if the dam, even when completed, were dropped as obsolete—the river would still be flowing. If the national media had communicated those economic facts, and the truth about the majority of the sixty square miles of family farmlands being condemned for speculative re-sale by Boeing Corporation, the pork barrel would not have dared to override the law and the God Committee economic verdict to finish such a dysfunctional project. But in both realms, local and national, the press simply and repeatedly fouled up.

A. State and Local Media

So why didn't the Tennessee media look into the facts of the Tellico Dam case—the dramatic issues of farmland condemnation and sketchy

67. According to 1980 notes, the UPI reporter to whom the author gave the story was Ed DeLong. The resulting story appeared in a Knoxville paper and galvanized a rapid reversal. See John Moulton, *Waste Dump at Tellico Possible*, KNOXVILLE NEWS-SENTINEL (Sept. 29, 1982).

68. See also Harry S. Mattice, Jr., *Winning a Battle, Losing a War: The "Snail Darter Case" and the Changing Relationship Between Law and Media*, 80 TENN. L. REV. (forthcoming Spring 2013).

economics, the GAO report censuring the project on benefit-cost grounds, the God Committee's unanimous economic verdict against the dam? Digging into the embarrassing facts of the project's justifications and preferable non-dam alternatives was apparently not a task that the local media was motivated to undertake. Tennessee's daily papers never explored whether the dam's economics might be shaky or that better alternatives might exist.

In part, the local press's reluctance may reflect the history of the region. When major initiatives had been accomplished, it was TVA that had done them. TVA was a dominating presence in the daily life of the region. It defined the local and regional political establishment. TVA press releases and its public information office were treated as unquestionable writ, and the contrarian arguments raised by Little T farmers and their allies appeared tainted with a sense of illegitimacy or iconoclastic marginality.⁶⁹ Given the agency's widespread power, opposition to TVA's will was dangerous; those who harbored doubts about agency projects and programs tended to keep their heads down.

Realistically, the dam opponents always expected Tennessee's regional media to be passive. Some local newspapermen were true Tellico Dam believers, like the crusading editor of the *Tri-County Observer*, Dan Hicks, who gained national recognition for countering the Ku Klux Klan. His paper maintained loud support for TVA's promises of economic modernization, going so far as to call the Tellico Dam project "just a godsend [and] the greatest thing that ever happened to this area!"⁷⁰

TVA's press office dominated local print and electronic media. In a few cases, when reporters daringly wrote articles indicating doubts about Tellico Dam, TVA stifled their inquiries by hiring them away to work for the agency. In other cases, it directly intervened; after his editors were pressured by TVA, Sam Venable, a senior Knoxville reporter confided, "I was told *I would not* column on Tellico!"⁷¹

The political culture of Tennessee undoubtedly shaped the editorial policies of many local media enterprises. According to reporters we talk to, local newspaper editors and TV and radio producers alike refuse to

69. Part of the dominance was probably attributable to a press tendency to grant government sources greater attention and legitimacy than nongovernmental consumer or environmental sources. Stephen Lacy & David C. Coulson, *Comparative Case Study: Newspaper Source Use on the Environmental Beat*, 21 *NEWSPAPER RES. J.* 1, 14-18 (2000).

70. See SHULER, *supra* note 16.

71. *Id.* at 45 (quoting Sam Venable on being silenced by *Knoxville News-Sentinel*, (and re-confirmed to author by Venable in July 2012)). Carson Brewer, a respected veteran eastern Tennessee journalist, ceased writing skeptical articles about Tellico when TVA hired him to write its official history, as did freelancer Jim Dykes, regretfully, when he likewise joined TVA's payroll. WHEELER & McDONALD, *supra* note 3, at 141-42.

authorize investigative reporting on Tellico Dam, the region's biggest controversy. A young reporter from the Lenoir City paper came up to the darter defenders after they had presented the full case against the dam at a local Rotary Club meeting, including data showing that the dam violated safety standards, imperiling portions of Lenoir City. Would he report the flood threat story and the economic case against the dam? The answer was, neither. "I know you're right about this Tellico Dam," the young reporter said, "but my publisher won't let me write a story that raises any doubts about it."

There may have been another more human reality behind the Tennessee media's deficiencies in reporting the case, notably after the dramatic God Committee verdict. For reporters and their editors in Tennessee (and for national media as well), there may have been a visceral instinctive resistance to changing the previous conceptions about the Tellico Project and the snail darter. Once the story is framed in the mind,⁷² nurtured by TVA's dominant media flow—a trivial fish versus a valuable hydro dam, with extremist outsiders whining about the region's most eminent governmental agency—it was understandably difficult to turn perceptions inside out. The same syndrome could easily apply to the media's audience as well. Over the six years, in probably thousands of daily conversations and talk radio phone-ins, people had expressed their belittling amusement or disgust with the silly minnow and the environmentalists who were using it to block progress. It's as hard for reporters as it is for regular citizens to change their minds on something they've accepted as a truism, and even harder if it means not only that they were wrong but that, further, they've been gulled, played for fools, swallowed lies aimed at the minds of a population lacking the sophistication to perceive a con job.⁷³

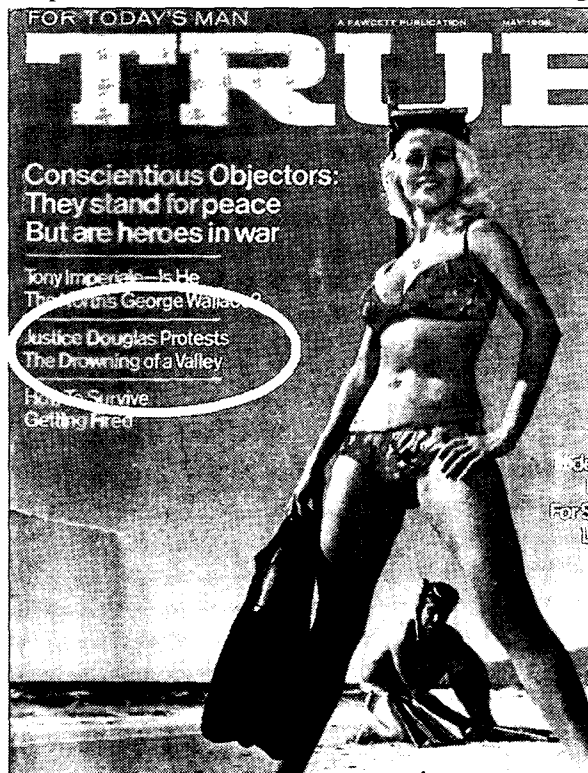
72. See George Lakoff, *Simple Framing: An Introduction to Framing and Its Use in Politics*, ROCKRIDGE INST., http://www.rockridgeinstitute.org/projects/strategic/simple_framing/ (last visited Apr. 23, 2006); see also GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004). Professor Lakoff studies how the industrial coalition that organized in the early 1970s with an agenda of building a conservative movement to take power in national politics consistently employed sophisticated techniques of word-spinning so as to make regressive policies seem quite progressive or benign. He follows this framing technique through examples from the current administration's misleading labels for its regressive policies under monikers such as "Healthy Forests Initiative," "No Child Left Behind," "Clear Skies Initiative," "Endangered Species Recovery," and "tax relief" efforts. *Id.*

73. Studies show that people care less about understanding the complexity and accuracy of an issue than adhering to their personal emotional reaction. See Joe Keohane, *How Facts Backfire—Researchers Discover a Surprising Threat to Democracy: Our Brains*, BOSTON GLOBE (Jul. 11, 2010), http://www.boston.com/bostonglobe/ideas/articles/2010/07/11/how_facts_backfire/; see also Ingrid S. Spangler & Donnalyn Pompper, *Corporate Social Responsibility and the Oil Industry*, 37 PUB. RELATIONS REV. 220 (2011).

In this context, it's not surprising that local and national public opinion doesn't easily swing now toward the farmers and the fish or that reporters and their editors, beyond their tendencies to follow the story line that had taken hold from the start and parrot TVA, are hesitating to acknowledge to themselves and their readers that they were patsies, failing to explore the most basic facts of a major controversy in their backyard.

B. National Media

The national press was as disappointing as Tennessee's in its coverage of the merits of TVA's Tellico Project. In small part that may have reflected the national reach of the regional agency's power. Several weeks after having been guided around the valley by the farmers and Cherokee, Justice William O. Douglas prepared an article that *National Geographic* agreed to publish, with extensive photographs showing the nation what it would lose if Tellico Dam was built. When Justice Douglas presented his article to the *National Geographic* magazine, Red Wagner and his TVA lobbyists intervened and persuaded the editor—and those of other magazines he



contacted—that it was too radical. Douglas finally had to publish the piece, “This Valley Waits to Die,” in *True, The Man’s Magazine*, where it was promoted on the cover alongside a blond starlet wearing a skimpy swimsuit and carrying a snorkel, a forum hardly befitting the work of a Supreme Court justice.⁷⁴

Where previously the darter’s quixotic legal victories had regularly been featured, with ironic photos, on the front pages of the nation’s newspapers, or as a lead story or final story on the nightly news, this latest and most upbeat chapter of the darter story is downplayed. The *New York Times* had posted the darter’s quixotic Supreme Court victory on A1, but the God Committee verdict had been covered only briefly, back on page twenty-two. The revelations of skewed pork barrel economics were hardly mentioned. Charles Mohr of the *Times*, recently assigned to the Washington environmental beat after superb war reporting from Saigon, listened to us, examined the maps showing vast acreages taken for resale, and was clearly interested, but ultimately told us, “I don’t see a workable hook for the *Times*. These new facts completely change the story that people have been hearing, but it’s too difficult, saying to our readers that now they’ve got to understand a whole new version.” The *Post* put the God Committee’s economic verdict on page twelve. The *Wall Street Journal*, which had railed so raucously against species litigation and called for sober economic analyses to resolve such controversies, put it on page eighteen. The God Committee story did not make most radio and TV shows. It was sent out on the Associated Press wire service, but many newspapers and local stations chose not to run it, and those that did completely failed to mention the economics.

C. Locally, Regionally, Nationally: What’s News?

How does the Press decide what to cover in newspapers and broadcasts, and how deeply? As two journalism professors noted, “The short answer is: nobody really knows. The ‘standard’ answer seems to be ‘Whatever they [or their editor] think their reader/viewer will be interested in.’”⁷⁵ Most news departments use some version of a common list of factors:

- Conflict;
- Impact;

74. WHEELER & McDONALD, *supra* note 3, at 84-85; William O. Douglas, *This Valley Waits to Die*, TRUE, THE MAN’S MAGAZINE (May 1969), at 40-43, 91-98.

75. E-mails from Barbara Croll Fought & Patricia H. Longstaff, Professors, Syracuse University S.I. Newhouse School of Public Communications, to David E. Cole, the author’s research assistant, Boston College Law School (Jul. 25, 2001) (on file with author). “The cynical answer is [that reporters report] whatever they can get easily (without a lot of research), and the *really* cynical answer is ‘Whatever has sex and violence.’” If it bleeds, it leads.

- Interest (of audience);
- Novelty;
- Prominence (people, institutions, etc.);
- Proximity; and
- Timeliness.⁷⁶

Note that the snail darter story at various times in those years would seem to have engaged all these attractor-stimulator factors likely to pull in readers and viewers, and would also serve a socially important public-information function. The puzzle is why it did not do so.

In a study of press sensationalism that focused on the Tellico Dam case, the authors were deeply critical of how the story was consistently trivialized in the *New York Times* (and in the Knoxville papers as well):

The press can be neither condemned nor absolved of responsibility for the sensationalism that existed in the articles It seems that the more unique an issue, the more likely it will be treated in a sensational fashion An event for the press must have inherent news value—a “quickenning urgency” befitting newsroom codes Since news space is limited, [editors] decide what is “newsworthy” and what is “extraneous” in headlines, leads, and major parts of news articles. Given such organizational constraints, one can better understand why the snail darter [itself] captured the attention of both the local and national press, and why the less “newsy” long-term issues, such as the dam’s impact on the economy, environment, and culture, did not.⁷⁷

In several instances with national reporters, the Tennesseans found a bemusing contradiction: although a common instinctive journalistic desire was to “scoop” the competition, many expressed reluctance to get too far out in front on a progressive issue—ironically, if someone else had previously published on the issue they’d feel more secure. In other cases it appeared to be a reluctance to focus on negative revelations about establishment entities for fear of being castigated as “too liberal,” although some were pleased to paraphrase or just print official press releases.

The complexity of the Tellico Project facts may in part explain the press’s diffidence. It was too complex to be summarized in a three-second quip or a twenty-second sound bite, forcing reporters or the darters’ advocates into unsuccessful attempts to distill a comprehensive analysis to a superficial summary or risk a glazed-over look from an editor or producer conveying the message that “our audience will never understand that.”

One unfortunate element may be the media’s general impression that the American media audience is unsophisticated scientifically and

76. *Id.*

77. Carroll J. Glynn & Albert R. Tims, *Environmental and Natural Resource Issues: Press Sensationalism*, TRANSACTIONS OF THE 45TH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE 99, 109 (1980).

politically, and uninterested in complex issues of societal governance.⁷⁸ In the current stressful context of modern publishing, media news divisions today are expected to be revenue-generating entities, no longer supported as a media corporation's civic responsibility. The diluted result is "infotainment," a breezy "news product" shaped by the need to build the largest possible potential audience. The news that is covered is not shaped by the significance of facts that a civil society needs to process publicly, a deficit exasperated by the pressure of selling ads.⁷⁹ Gauging potential media audience numbers is a process of marketing analysis. The news business today is a business, and its marketing logic typically often pegs the product at the level and format deemed likely to attract the largest block of American consumers. The perception, it seems, is not necessarily that the American media audience and voters are stupid so much as ignorant, in the sense of uninformed and unknowing.⁸⁰

78. The ignorance of Americans about processes and issues in domestic and international politics is evident in many public polls. For example, a Harris poll conducted for the American Bar Association released in December 2005, revealed that only 55% of the American public could correctly identify the three branches of government; 22% named the branches Democrat, Republican, and Independent, and 16% named them local, state, and federal. *See Harris Poll Reveals Governmental Knowledge of Many Americans*, DAILY RECORD (Dec. 13, 2005). Additionally, 29% of the public answered that the role of the judiciary is to advise the President and Congress on the legality of future actions.

79. "Local journalistic institutions that have traditionally served democracy by promoting values of openness, accountability, and public engagement are themselves in crisis from financial, technological, and behavioral changes taking place in our society." Knight Commission Report, *supra* note 11, at xii. News that hurts potential ads can undercut the financial position of the media entity. Upholding the status quo, not rocking the boat, is generally the most profitable avenue for news owners, given the industry's reliance on corporate advertising. *See* J. HERBERT ALTSCHULL, AGENTS OF POWER: THE MEDIA AND PUBLIC POLICY 107, 397-98 (2d ed. 1995).

80. Twenty years ago, many or most electronic media news departments and newspapers operated with a professional sense of responsibility as the public's source of information, despite the substantial cost of maintaining reporters around the world. In 1986, NBC's News cost the network as much as \$100 million a year. *See* Marc Gunther, *The Transformation of Network News*, Nieman Reports (Special Issue), Summer 1999, at 20, 21; *see also* Sarah Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promoted the Punitiveness Revolution* (Jan. 2005) (unpublished manuscript, on file with BOSTON COLLEGE ENTVL. AFF. L. REV.). The financial burdens were treated as the price of enjoying bandwidth monopolies on the airwaves and recompense for the privilege of operating national networks. Since the early 1980s, however, the traditional news audience has declined precipitously, and network and newspaper consolidation has led to large-scale corporations that expect revenue production from all divisions, and pressures for generating profits. General Electric bought NBC, Capital Cities Communications bought ABC, and Laurence Tisch, a hotel and theater entrepreneur, took over CBS. Subsequently Disney bought ABC and Viacom took over CBS. For a review of these moves and their consequences, *see* JAMES T. HAMILTON, ALL THE NEWS THAT'S FIT TO SELL: HOW THE

The perception of the American audience as uninformed and indiscriminate regarding issues of social policy and governance is unfortunately furthered by the way that American journalists are generally coached in how to present the news. The Fogg Index is an elaborate method by which the text of journalistic stories is scaled in terms of relative education levels.⁸¹ According to several reporters, most American media target the level of their discourse at a Fogg Index of an eighth-grade reading level or lower. Only a few national newspapers target their text at a Fogg Index level of high school graduate or higher.⁸² It is true that the complexity or reading level of a text's syntax does not necessarily equate with the reader's level of reasoning or analytical and logical ability, but observation of mass media suggests that a convincing case can be made that the material being transmitted is as low in brainpower as it is in syntax.

And there is the public information dominance of established interests. Any analysis of how the media performs its information function must also take into account the societal realities of the national context in which they operate. In an era of massive industry-funded denial of human-caused climate change and the Supreme Court's *Citizens United* majority decision,

MARKET TRANSFORMS INFORMATION INTO NEWS 160-89 (2004). The corps of reporters—especially expensive foreign-posted reporters—has been cut back substantially, and news formats are now dominated by less expensive “infotainment,” “soft” features, with shrunk commitments to actual news reporting. See Beale, *supra* at 20.

81. The Fogg Index represents the level of writing for a particular educational grade. Follow the steps below to calculate the Fogg Index of your content:

1. Select a sample of at least 100 words.
2. Compute the average number of words per sentence:
 - a. Divide the number of sentences into the total number of words in the sample.
3. Compute the percentage of words with 3 or more syllables (Exclude words where the polysyllable is created by -ed or -ing. Exclude proper nouns.)
 - a. Divide the number of words into the number of polysyllables.
4. Add the average number of words per sentence (2a) to the percent of polysyllables (3a).
5. Multiply the sum by 0.4 and round off to the nearest tenth.

This is your Fogg Index.

ROBERT GUNNING, THE TECHNIQUE OF CLEAR WRITING (1952), as presented in Univ. of Virginia, Best Practice Briefs (Jun. 2005) at 4, available at <http://www.virginia.edu/provost/public/pdf/writingreports.pdf>.

82. Consider the issue of global warming in the American media. A FoxNews.com climate change story rated a 29, making it understandable to someone between eleventh and twelfth grade. See Robert Roy Britt, *2005 Ties for 2nd Warmest Year Ever, but Cause Still Uncertain*, FOX NEWS (Jan. 9, 2006), <http://www.foxnews.com/story/0,2933,180896,00.html>. A CNN.com story scored a 32, making it understandable to a high school graduate. See *2005 Was Australia's Hottest Yet*, CNN (Jan. 4, 2006), information available at http://www.bom.gov.au/announcements/media_releases/nt/20060104year.shtml. A *New York Times* story scored a 35, making it understandable to someone who spent two years in college. See Nicholas D. Kristof, *A Paradise Drowning*, NEW YORK TIMES (Jan. 8, 2006), at A15. Calculations for each story were based on a test of the first 300 words of each article.

it is notable how powerful establishment interests dominate the political and informational networks that shape our society's governance.⁸³

On its facts, complex though they were, the snail darter-Tellico Dam story was brimming with legal, political, economic, even philosophical import. It could have shaped a long-running news cycle with successive stories on all the intriguing features of the saga—Indians, farmers, agency pork, corrupt officials, junk science, fraudulent economics, David revealing Goliath to be a midget, the important implications for other federally-subsidized boondoggles, an affirmation of American pluralist democracy as local citizens with no political power carried an issue to the highest levels in the land, the unique Committee of God But it did not happen. As far as the American public was concerned, the silly little fish story remained an unchanged caricature.

D. What More Could the Citizens Have Done to Push the Media to Look Into the Facts?

Throughout the snail darter-Tellico Dam history, the Tennessee citizens kept asking themselves what more could be done to prompt the media to look into the dramatic facts of the case. The author's neighbor in Ann Arbor, Michigan, Charles Eisendrath, a professor of environmental journalism, had been a *Newsweek* reporter. "You've got to start a *news climate* rolling," he told us. "The articles you've been getting just aren't doing it. The story needs to have *legs*, you need to find *hooks* for a continuing series of articles digging into the case!"

Hooks and legs, but how? Naming the case "Tellico Farmers v. TVA" might well have done it, but that option was in the past. The group considered a variety of innovative gimmicks to hook in press attention. Get celebrities to speak on the project's flaws and the river's economic potential? Unsuccessful efforts were made to reach Chip Carter, the President's son, for a float trip on the river; Robert Redford, who had exhibited an environmental consciousness; Dolly Parton, who grew up farther up Highway 411 that crossed the river. How about painting the concrete structure of the dam with big pink letters?—" \$4 million Turkey," and getting a photograph on the AP wire before TVA could erase the paint, inviting a story that the dam was small and most of the project's vaunted \$100+ million budget was for condemning farmland for resale, plus useful new roads and bridges that served river-based alternatives. The citizens never pulled that off nor an elaborate road show demonstrating what the valley could look like with tourism, farming, river-based recreation, plus an

83. See Chris Mooney, *As the World Burns, Some Like It Hot*, MOTHER JONES MAGAZINE, (May-June 2005) (analyzing millions of dollars being spent by oil companies to support climate denial); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

industrial park and residential areas, that proved logistically too much for the exhausted group.

One evening, the author called former *Washington Post* ombudsman, Ben Bagdikian, then teaching at Berkeley. Reporters all over the country revered Bagdikian as the conscience of the journalistic profession. But, "I'm sorry," he said wearily. "I can't tell you how to reverse the way your story is getting covered. This is an era of industrial arrogance. There's a strong tide running against environmentalism in the press and in politics." The most Bagdikian could suggest was that "Maybe you could persuade Ruder & Finn to take on your case." Ruder & Finn was a press relations firm volunteering a measure of public interest public relations work. The Ruder & Finn contact, when told the essential facts of the case, expressed strong interest in taking it on pro bono but noted that the firm would need a check from the Tennesseans for \$20,000, "to cover expenses." If that kind of funding was what is needed to bring significant public information into the media and political processes, the implications for democracy weren't promising.

E. Would the Internet Have Solved It? A Public Interest Information Archive in Cyberspace?

If it had then existed, would the miracle of the Internet have offered a solution to the darter group's problem of building informed public perceptions? Today's blogosphere has extraordinary ability to transmit revelations in text and images virally around the globe in nanoseconds. The Internet offers the most powerful and sophisticated knowledge transfer mechanism in human history. Unfortunately, however, the information transfer functions of the Internet are chaotic. There is no mechanism for verifying the accuracy of facts and analysis other than the volunteered efforts of engaged participants, which takes constant attention and individual effort on an ever-changing topography, and the market forces that so often skew public information toward narrowed special interests have the incentive and ability to intrude and maintain their version of reality in the Internet realm.

Here is a hypothesis for how today the facts of a darter-dam controversy could be accurately conveyed through the hyper-capabilities of modern communication technology. Take for example the congressional pork barrel's reaction to Secretary Andrus's letter. The pork barrel insiders knew that they could operate without regard to the public merits because the public did not know the merits. If every member of Congress who stood to make a speech against the ESA and the snail darter—about how the darter was destroying the economic future of its locality, blocking a huge hydroelectric dam, or the Act stopping thousands of economic projects across the nation—knew that reporters could go to one comprehensive public interest information website where their allegations would be laid out and contradicted by the facts, then the debate would tend to move closer

to the truth. Such a website could contain a compendium of different environmental issue sectors, each with summaries of the opposing assertions and authoritative presentations of the public interest case, charts, maps, data, sound bites, lists of published sources and experts available to respond to reporters' queries, online photographs and B-roll video footage. Reporters themselves would be straightened up by the knowledge that if they wrote stories that ignored information readily available in one consistent authoritative location, they would be caught out as incompetent. Such an experiment should be worth trying for civic-minded foundations willing to risk a couple million dollars in a high-aspiration venture that could change the nature of public policy discourse in modern democratic governance.

VI. CONCLUSION

Several years after the Little Tennessee River was impounded, as TVA, confronting the failure of its development plans, held an auction of large blocks of condemned farmlands. CBS's Dan Rather sent reporter Bernard Goldberg down to Tennessee to look into the auction. His video report interviewed Nell McCall, Jean Ritchey, and Beryl Moser, farmers who were excluded from buying back their lands because the compensation they'd been given was a small fraction of what the land would yield at auction. The reporter noted the failure of TVA's economic claims, and the unsuspected facts of farmlands condemned for resale, not for the reservoir. As the video report ended, back in the studio in New York, Dan Rather's voice had a catch in it as he signed off for the night. He continued to sit grimly at the news desk as the closing credits rolled. When the "Live-On-Air" light finally winked off, he jerked around in his chair and barked at Kathy Moore, the producer who had prepared the retrospective on the Tennessee endangered species controversy. "Goddammit!," Rather yelled. "*We missed the fucking story!* How in hell, over all those years, did we miss *the whole fucking story?*!" "Rather had tears in his eyes," Moore recounted to the author. "He was choked up and angry. I didn't have the heart to tell him that we *had* filmed the story. Harry Reasoner had done the reporting. We had it ready in the can for 60 Minutes. I don't know why CBS didn't run the story," Moore said. "Somehow they could never find the time."⁸⁴

The media's role in this classic case reflects an ambiguity in modern American democracy. In no other country in the world could a small group of people so lacking in power and influence have challenged a politically powerful mistake so long and so far through the highest levels and through

84. The author's conversation with CBS Segment Producer Kathy Moore occurred at lunch in Newton, Massachusetts in the late 1980s when she visited Boston College and had extended discussions about the Tellico Dam Controversy in retrospect.

so many branches of national government—and the citizens came very close to winning. With just one or two additional happenstances—intelligent media coverage *alone* would almost surely have done it—the river could still be flowing today. The farmers would still be farming, the valley’s economy prospering with tourism, agriculture, an active trout-fishing destination drawing anglers from throughout the Southeastern U.S., an industrial park at the river’s highway and rail crossing, and residential clusters along Highway 72—social and entrepreneurial development far better in economic as well as ecological terms than it is at present. And the darter would still be darting among its cobblestones beneath the riffles of the Little Tennessee.

